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CASE NO. 81-2280

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

DENNIS D. CALLAWAY,

PETITIONER,

V.

STATE OF WISCONSIN,

RESPONDENT.

ON A PETITION FOR WRIT OF CERTIORARI
TO THE WISCONSIN SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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SUMMARY OF ARGUMENT

The petition for writ of certiorari should be denied because the decision of the Wisconsin Supreme Court is in accord with previous decisions of this Court and is not in conflict with other state court decisions. This case does not raise issues which require resolution by this Court, or which are appropriate,

under the facts of this case, for review by this Court. The decision of the Wisconsin Supreme Court is correct and the result was fair.

There are no special and important reasons which warrant review in this case.

ARGUMENT

I. THIS CASE DOES NOT PRESENT SPECIAL AND IMPORTANT REASONS WHICH WOULD JUSTIFY CERTIORARI REVIEW BECAUSE THE CASE DOES NOT RAISE ISSUES WHICH NEED TO BE RESOLVED BY THIS COURT AND BECAUSE THE DECISION OF THE COURT BELOW IS CONSISTENT WITH OTHER DECISIONS BY THIS COURT AND IS NOT IN CONFLICT WITH DECISIONS FROM OTHER JURISDICTIONS.

A. This Court need not accept this case in order to define what constitutes a lawful automobile impoundment for noninvestigatory purposes.

This case involves the narrow issue of whether a police impoundment and sub-

sequent inventory search of an automobile driven by petitioner after his arrest was reasonable and therefore constitutional.

Petitioner urges this Court to accept this case for review in order to define for the lower courts, prosecutors and police what constitutes a lawful impoundment as a prerequisite to a lawful inventory search. Respondent believes a decision by this Court on that specific question is not necessary to guide the lower courts. This Court's decision in South Dakota v. Opperman, 428 U.S. 364 (1976), provides sufficient guidance. The Court in Opperman did not specifically address the lawfulness of the impoundment. However, its discussion of the "community caretaking function" of the police, which allows them to take custody of vehicles for a

variety of reasons, sets forth the allowable parameters of impoundment:

> In the interests of public safety and as part of what the Court has called "community caretaking functions," Cady v. Dombrowski, supra, 413 U.S. at 441, 93 S.Ct. at 2528, automobiles are frequently taken into police custody. Vehicle accidents present one such occasion. To permit the uninterrupted flow of traffic and in some circumstances to preserve evidence, disabled or damaged vehicles will often be removed from the highways or streets at the behest of police engaged solely in caretaking and traffic-control activities. Police will also frequently remove and impound automobiles which violate parking ordinances and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic. The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge.

Opperman, 428 U.S. at 368-69 (footnote omitted).

In Opperman, the vehicle was impounded after it had been parked illegally in a municipal parking lot and had been ticketed twice. Opperman, 428 U.S. at 365-66. There is absolutely no hint in the opinion that the vehicle was impeding traffic or causing a safety hazard at the time it was impounded. There is no indication in the opinion that the police should have considered less drastic alternatives before impounding the car. Had this Court thought the impoundment defective, that fact would have been reflected in the opinion.

This Court's decision in Opperman implicitly stands for the proposition that an impoundment is lawful when it is made pursuant to usual police practices as part of the general police community caretaking function, and that when an

impoundment of a vehicle comes within that caretaking function, the courts will not delve further to determine whether the impoundment was actually necessary or whether a less drastic alternative could have been used.

The general guidelines implicit in Opperman and the touchstone of reasonableness, which is the ultimate standard of the fourth amendment, are sufficiently definite to allow the lower courts to determine whether particular impoundments are legal. The final result will depend upon a case-by-case analysis. An attempt to further define what would be reasonable is neither necessary nor achievable, and does not provide an adequate ground for review of this case.

B. The decision by the Wisconsin Supreme Court carefully and fully considered the issues and decided them correctly.

The decision of the Wisconsin Supreme Court recognized that automobiles are entitled to a reduced expectation of privacy, but that the ultimate fourth amendment standard of reasonableness is nonetheless applicable to searches involving automobiles. State v. Callaway, 106 Wis. 2d 503, 508-10, 317 N.W.2d 428, 431-32 (1982) (App. 8b-11b, appendix references are to the appendix filed by the petitioner). The Wisconsin Supreme Court applied this reasonableness standard to determine that the initial impoundment of the vehicle was reasonable, under the facts of this particular case.

The court did not hold that any automobile may be impounded at any time without reasons or justification. Rather, the court simply held that in this particular case it was not unconstitutionally unreasonable for the police to impound the automobile. The police had arrested the driver, who was the sole occupant of the automobile, on an unrelated traffic offense and were going to remove him to the police station, leaving the car unattended; the car had been stopped in a no parking area; and the driver, when asked, knew of no one who could come and take charge of the car. The driver was given the choice of having someone else take charge of the car or having it towed or driven by the police to the impoundment area. He allowed the police to drive the car.

Under these circumstances, the Wisconsin Supreme Court found it was reasonable for the police to seek to protect the car from theft and vandalism and to protect themselves from claims of negligence by impounding the car for safekeeping. Callaway, 106 Wis. 2d at 513; 317 N.W.2d at 434; App. 17b-18b.

This case involves a narrow factual question regarding this particular impoundment. Any speculation about whether the police department policy involved here would lead to unreasonable impoundments in other situations is not appropriate. This case is limited to its own facts.

This case was decided on the grounds that the impoundment was reasonable. The issue before the Wisconsin Supreme Court was not whether the petitioner gave a valid consent to the im-

poundment. The court's discussion of consent was merely part of the analysis of the reasonableness of the seizure. There is no basis for this Court to accept this case in order to explore this limited aspect of the case.

The decision of the lower court is not erroneous and does not evidence a misunderstanding or misapplication of guiding principles of constitutional law. It is not this high Court's function to review a case under these circumstances. Cf. National Labor Relations Board v. Pittsburgh Steamship Company, 340 U.S. 498, 502 (1951).

C. The decision of the Wisconsin Supreme Court does not create a conflict with other state court decisions.

Petitioner urges this Court to accept review of this case in order to

resolve a perceived conflict between this decision and decisions of other state courts. However, the cases relied upon by petitioner to demonstrate this conflict are distinguishable on their facts, and thus do not evidence a real and substantial conflict in the law.

The Wisconsin Court of Appeals had attempted to follow the decisions of other state courts in finding the impoundment illegal. The Wisconsin Supreme Court, in reversing the Wisconsin Court of Appeals, accepted the basic rule requiring consent or reasonable police need as a prerequisite to impoundment and found that standard to be met here. The Wisconsin Supreme Court, in so doing, distinguished decisions of other jurisdictions on their facts. The Wisconsin Supreme Court stated:

In analyzing the question of what constituted a lawful impoundment as a condition precedent to a warrantless inventory search, the court of appeals concluded that based upon the decisions of several other courts, a vehicle is lawfully impounded if the owner or driver gives his or her informed consent or if there is shown to be a reasonable police need to impound the vehicle. See: State v. Slockbower, 79 N.J. 1, 397 A.2d 1050 (1979), and cases summarized therein. Applying this standard to the facts of this case, the court of appeals concluded that the impoundment in the case at bar was not lawful. We reject this conclusion of the court of appeals, however, and hold that the facts of this case satisfy that standard as Callaway was informed that the car would be impounded if he could not suggest another driver the police could contact and he consented to the impoundment of the vehicle and voluntarily surrendered his keys to the officer.

We note that several of the cases analyzed by the court of appeals are factually distinguishable from the case at bar and our decision in this case is not necessarily inconsistent with them. For example, in State v. Bales, 15

Wash. App. 834, 552 P.2d 688 (1976), the impoundment was found unconstitutional because the defendant indicated that a friend could arrive in a short time to pick up the car and, thus, the impounding of the car was unnecessary. Similarly, in State v. Goodrich, 256 N.W.2d 506 (Minn. 1977), the defendant arranged to have his brother pick up the car. In Granville v. State, 348 So. 2d 641 (Fla. App. 1977), the car could have been left where it was parked in a friend's driveway and in People v. Miller, 7 Cal. 3d 219, 101 Cal. Rptr. 860, 496 P.2d 1228 (1972) the defendant expressly stated that he preferred to assume the risk of leaving his property in the car.

In light of the fact that Callaway was given the three alternatives for the removal of the automobile, the fact that the car was illegally parked at the spot where it was pulled over, and the fact that after a thorough search of the record, we find no indication that the impoundment was a mere pretext for searching the car and the defendant has not argued as much to this court, we hold that the impoundment of Callaway's car was reasonable and, thus, it [sic] not violative of the fourth amendment prohibi-

> tion against unreasonable searches and seizures.
>
> We now discuss the question of the reasonableness of the inventory search made of the car, including the locked glove compartment, since we have concluded the impounding of the vehicle was necessary and reasonable because of the need to protect the vehicle from damage, theft or vandalism and because Callaway was given three alternatives for the removal of the illegally parked car.

Callaway, 106 Wis. 2d at 513-14, 317 N.W.2d at 434; App. at 15b-18b (emphasis in original).

It cannot be said that the Wisconsin Supreme Court's decision departs from other state court decisions by failing to adopt a consent or reasonable police need or cause requirement as a prerequisite to impoundment, for it appears to adopt and apply that standard.

The determination of the reasonableness of an impoundment depends upon

the facts of the particular case. Differences in results from other state cases is due to differences in the facts. Such differences do not create the type of "conflict" which this Court should resolve.

This Court has stated that its discretionary review by certiorari should be reserved only for those "cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." NLRB v. Pittsburgh Steamship, 340 U.S. at 502 (emphasis added).

A real and embarrassing conflict of opinion and authority which would justify review does not exist here.

D. The Wisconsin Supreme Court did not err in failing to require the petitioner's consent to the inventory search, and this is not the appropriate case to decide when or whether an inventory search of an impounded vehicle must be conditioned on the consent of the owner or driver who is present at the scene.

Opperman involved an automobile which was illegally parked and the owner or operator of the automobile was not present at the time of the impoundment. The Court in Opperman did not have occasion to discuss whether the consent of the owner or driver is necessary if he or she is present.

However, the mere fact that this Court has not previously addressed an issue, without more, is not a sufficient ground for certiorari review.

This case is not a proper vehicle for raising the issue. In the Wisconsin Court of Appeals the petitioner did not raise the issue of whether consent from an available owner or driver is a prerequisite to a lawful inventory search, and the Wisconsin Court of Appeals did not address that queston. Although petitioner belatedly raised the issue in the Wisconsin Supreme Court, that court did not directly address the issue. By upholding the search, the court apparently rejected petitioner's argument. Callaway, 106 Wis. 2d at 515-18, 317 N.W.2d at 435; App. at 18b-24b. Nonetheless, this issue has not had the full consideration below which would make it appropriate for review here.

In addition, this case is inappropriate for review because there is evidence in the record which demonstrates

that the petitioner, who was driving the car, was not the owner of the car. Callaway, 106 Wis. 2d at 504 n.1; 317 N.W.2d at 429 n.1; App. at 27b n.1. This Court's ruling regarding whether consent of an owner of a car, who presumably knows the contents of the car and can decide whether or not he wants it searched, might be of no significance where the driver is not the owner. Where the driver is not the owner, he might not know whether there are items in the automobile which the owner would want secured. See United States v. Edwards, 577 F.2d 883, 884 n.23 (5th Cir. 1978). We have no record in this case establishing this petitioner's actual relationship to the car and no basis for determining whether he could properly have consented to its search. A casual driver of another's car might

well not have the same status for this purpose as the owner. The unresolved facts in this case make it a poor case for this court to review in order to resolve the question presented.

Review is also unnecessary here because the Wisconsin Supreme Court's implicit holding that consent to the inventory search is not necessary is correct and in accord with this Court's decision in Opperman. Requiring consent may serve one purpose of the inventory search, the protection of the owner's property, but it does not serve the purpose of protecting the public and the police. This Court rejected a "consent theory" in Opperman because an inventory search is not exclusively for the purpose of protecting the car owner. Opperman, 428 U.S. at 376 n.10.

E. Review by this Court is not necessary to determine whether the scope of a lawful inventory search includes a locked glove compartment.

This Court in Opperman found that it was not unreasonable for the police to search an unlocked glove compartment as part of an inventory search. Opperman, 428 U.S. at 376 n.10.

The Wisconsin Supreme Court correctly concluded that the fact that the glove compartment in this case was locked is not constitutionally significant. The Court carefully limited the allowable scope of the inventory search to the purposes which justify such a search. Callaway, 106 Wis. 2d at 516-18, 317 N.W.2d at 435-36; App. 19b-23b. This decision is in accord with federal decisions. See United States v. Martin, 566 F.2d 1143, 1145 (10th Cir.

1977); United States v. Barnes, 604 F.2d 121, 166 (2nd Cir. 1979).

In addition, this Court's recent decision in United States v. Ross, 50 U.S.L.W. 4580 (1982), although not discussing inventory searches, is not inconsistent with this result.

CONCLUSION

Based upon the legal authorities and arguments stated herein, the respondent respectfully asks this Court

to deny the petition for writ of certiorari.

Respectfully submitted,

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